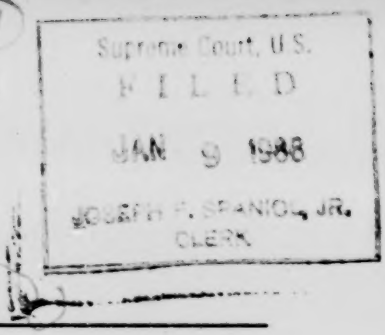
85-1375



No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES L. BAWCUM, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

PAUL MICHAEL VUKSICH
ATTORNEY FOR PETITIONER
244 KEARNY STREET
SAN FRANCISCO, CALIFORNIA 94108
TELEPHONE (415) 421-6438

15 5 pp

QUESTIONS PRESENTED

1. Under 10 U.S.C. 1163(d), a member of the reserve component of the Army who is on active duty and is within two years of becoming eligible for retirement pay or retainer pay under a military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary of the Army. Is the decision of the Army Board for the Correction of Military Records (ABCMR) that at the completion of an active duty tour on May 21, 1984, the petitioner was not entitled to service credit which would place him within two years of eligibility for retirement, supported by substantial evidence, not

arbitrary or capricious, and not otherwise contrary to law?

2. Did the district court and the court of appeals apply the correct standard of review to the ABCMR decision in light of the unique circumstances of this case?

TABLE OF CONTENTS

	Page
Opinions below.....	1
Jurisdiction.....	2
Statutes and regulations.....	2
Statement.....	16
Argument.....	25
Conclusion.....	51

Appendices

Memorandum, Court of Appeals.	A
Judgment/Order District Court.....	B
ABCMR Memorandum of Consideration.....	C
Denial of Rehearing, Court of Appeals.....	D
ARPERCEN letter, January 1, 1984.....	E
ARPERCEN letter, May 17, 1984.....	F
Stipulation to ABCMR review.....	G
LTC Jelen Declaration.....	H

TABLE OF AUTHORITIES

	Page
Cases:	
Borys v. U.S., 201 Ct.Cl. 597 (1973)	47
Cass v. U.S., 417 U.S. 72 (1974)	50
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	47
Fenwick v. Finch, 439 F.2d 831 (1971)	40
National Welfare Rights Organization v. Mathews, 533 F.2d 637 (1976)	41
Perkins v. Matthews, 400 U.S. 379 (1971)	46
Phoenix Title and Trust Co. v. Stewart, 377 F.2d 978 (9th Cir. 1964)	45,48
Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975)	42,45
Stauffer Laboratories, Inc. v. FTC, 343 F.2d 75 (9th Cir. 1965)	44
U.S. v. United States Gypsum Co., 333 U.S. 364 (1948)	39
Statutes and regulations:	
10 U.S.C. 101(22)	3
10 U.S.C. 1163(d)	2,13,35
10 U.S.C. 1331	4
10 U.S.C. 1332	5
10 U.S.C. 1333	5,6,7,49
10 U.S.C. 1405	4,49,50

	Page
10 U.S.C. 1552(a)	14
10 U.S.C. 3911	3,49
10 U.S.C. 3926	3,49
10 U.S.C. 3991	4,49,50
28 U.S.C. 1254(1)	2
28 U.S.C..1331	24
Department of Defense Pay and Allowance Entitlements Manual	10,33
Joint Travel Regulation	8,11,30,34
AR 15-185 (5/18/77)	14,15
AR 135-200 (1/1/83)	7,8,9,12,30 31,34,35
AR 135-210 (1/1/82)	7,8
AR 140-185 (9/15/79)	6
AR 635-100 (chg. 7/26/84)	13,35

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO.

JAMES L. BAWCUM, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum of the court of appeals [App. A1-A5] and the judgment/ order of the district court [App. B1-B5] are unreported. The memorandum of consideration of the Army Board for the Correction of Military Records (ABCMR) is found in the appendix hereto at C1-C61.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1985. A petition of rehearing was denied on December 6, 1985 [App. D]. The petition for a writ of certiorari was filed on January 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. 10 U.S.C. 1163(d) provides:

> "Under regulations to be prescribed by the Secretary concerned, which shall be as uniform as practicable, a member of a reserve component who is within two years of becoming eligible for retired pay or retainer pay under a purely military retirement system, may not be involuntarily released from that duty before he becomes eligible for that pay, unless his release is approved by the Secretary."

2. 10 U.S.C. 3911 provides:

> "The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer."

3. 10 U.S.C. 3926 provides in pertinent part:

> "(a) For the purpose of determining whether an officer of the Army may be retired under section 3911...of this title, his years of service are computed by adding (1) all active service performed as a member of the Army..."

4. 10 U.S.C. 101(22) provides:

> "'Active duty' means full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

5. 10 U.S.C. 3991 provides in pertinent part:

> "The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table...
>
> Formula A, for section 3911...years of service credited to him under section 1405 of this title."

6. 10 U.S.C. 1405 Years of Service provides in pertinent part:

> "For the purposes of section... 3991 (formula A)..., the years of service of a member of the armed forces are computed by adding--(1) his years of active service;...(3) the years of service, not included in clause (1) or (2), with which he would be entitled to credit under section 1333 of this title if he were entitled to retired pay under section 1331[1]/ of this title."

1/ 10 U.S.C. 1331 and following begins a chapter involving a nonregular retirement system for reservists. 10 U.S.C. 1405 allows crediting of certain nonregular retirement points to the regular retirement system of 10 U.S.C. 3991.

7. 10 U.S.C. 1333 provides in pertinent part:

> "For the purpose of computing retired pay of a person under this chapter, his years of service and any fraction of such a year are computed by adding--(1) his days of active service...(3) one day for each point credited to him under clause (B) or (C) of section 1332(a)(2)2/ of this title, but not more than 60 days in any one year; and... by dividing the sum of that addition by 360."

2/ 10 U.S.C. 1332(a)(2) governs how a reservist receives credit for a "good year" of service under the non-regular retirement system. A good year requires a minimum of 50 points which may be earned in a variety of ways including non-active duty (weekend warrior) service. Reservists may earn more than the 60 day limit if the service is active duty.

8. Army Regulation (AR) 140-185,3/ paragraph 2-1 provides in pertinent part:

> "The limitations on the number of points which may be credited to a member during a retirement year are--
>
> a. Maximum - 365 (366 during leap year) points...."

3/ AR 140-185 applies only to members of the United States Army Reserve, both on active and non-active duty. If the 10 U.S.C. 1333 denominator of 360 is applied to eligibility for retirement pay as well as to amount of retirement pay, a reservist over a 20 year period could conceivably reach retirement eligibility 104 days sooner than his regular counterpart. He will certainly be paid for 104 more days although the same dates of service applied to each.

9. AR 135-2004/ provides in pertinent part:

> "The date of entry on duty will not be shown on order."
>
> Paragraph 1-15,
>
> "The date of release from duty will not be shown on the orders."

10. AR 135-2104/ provides in pertinent part:

4/ In the ABCMR decision, the ABCMR refers to a portion of the comments furnished by the office of the Judge Advocate General (OTJAG). See App. C8 and C51. AR 135-200, paragraphs 1-13 and 1-15 and AR 135-210, paragraph 4-2, are given by OTJAG as authority for the proposition that a "period of active duty" includes travel time. This is exactly contrary to what these regulations provide. AR 135-200, paragraph 1-7b.(2), is even more clear when it states that the period of active duty will not include travel time. This error by the ABCMR and OTJAG is the nucleus of why the ABCMR decision is absolutely wrong.

Paragraph 4-2,

"The date of entry on active duty will not be shown on the orders."

11. AR 135-200[4]/ provides in pertinent part:

Paragraph 1-7b.(2),

"The period of training will not include travel time to or from the duty station."

12. JOINT TRAVEL REGULATION, Appendix J, Subparagraph P, provides in pertinent part:

"PERMANENT CHANGE OF STATION ....includes the change from home or from the place from which ordered to active duty to the first permanent duty station upon...call to active duty for 20 weeks or more or active duty for training for 20 weeks or more...

It further includes the change from the last permanent duty station to home upon...release from active duty to which called for 20 weeks or more..."

13. AR 135-200, paragraph 1-7

b.(1) provides in pertinent part:

> "The permanent home address (home of record) is the actual place in which the member lives...The place listed as the permanent home address will constitute the 'home' or 'home of record' as used in Joint Travel Regulations (JTRs) and the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM). Orders issuing agencies may correct a home of record by amendment if it will be published before the member enters duty. Orders will not be amended after the member enters on duty unless approved by ARPERCEN."

14. AR 135-200, paragraph 1-11c.

provides:

> "Training for 90 days or more. (1) Travel time will be based on the mode of transportation authorized and actually used. If travel by POV is specifically authorized and actually used, travel will be computed using POV travel time. If a member authorized to travel by POV uses public transportation, the travel time will be

computed using the mode of public transportation used.

(2) The travel time allowed to return home will be computed as follows, regardless of the type of transportation used:

(a) If POV is authorized and the member submits a statement of intent to travel by that mode, travel time will be computed using POV travel time.

(b) Travel time will be computed using surface transportation if POV is not authorized. The same is true if POV has been authorized and the member indicates he or she does not intend to travel by POV."

15. Department of Defense military Pay and Allowances Entitlements Manual (DODPM), paragraph 10241, provides in pertinent part:

"a. Reserve members called to active duty are entitled to active duty pay and allowances for time allowed for necessary travel:

(1) From home to first duty station; and (2) from last duty station to home...

b. Any amounts due a member for active duty, or for return home after release from such duty, may be paid before member leaves the duty station, without regard to actual performance of the travel...."

16. Joint Travel Regulations, Members of the Uniformed Services, Volume 1, (JTRs), paragraph M4156, provides in pertinent part:

"When a member travels under the circumstances described herein, allowances will be as indicated in each case....

Case 3. Member Ordered Permanent Change of Station While on Temporary Duty

A member who receives orders while on temporary duty directing a permanent change of station may be authorized permanent change-of-station allowances from the temporary duty station to the old permanent duty station and then to the new permanent duty station via any temporary duty

station...Travel allowances prescribed by this case may be authorized...only when the member must travel to the old permanent duty station to arrange for shipment of household goods, to pick up personal possessions, or to bring his privately owned conveyance to the new permanent duty station."5/

17. AR 135-200, paragraph 5-4, provides in pertinent part:

"APPROVAL AUTHORITY
Requests for SADT tours will be sent through command channels to one of the approving authorities in a through f below:...
b. Deputy Chief of Staff for personnel (DCSPER). Authority for the following tours:
(1) A member who would be credited with 18 or more years of active Federal

---

5/ This regulation shows that a member is always expected to move his personal vehicle when the Army changes where he is required to live, except possibly when outside the continental United States (OCONUS). Otherwise, travel by personal vehicle (POV) is always authorized incident to a permanent change of station (PCS).

service at anytime during the SADT tour....

e. Commanders, FORSCOM, TRADOC, USAREC, and ARPERCEN for USAR tours of 179 days or less...."6/

18. Interim Change No. I07 to AR 635-100 adds paragraph 3-19.1, which provides in pertinent part:

"Officers who are within two years of eligibility for military retirement pay will not be involuntarily released from active duty until eligible for such retirement. Exceptions to this policy

---

6/ DCSPER is the senior personnel officer for the Department of the Army. His counterparts at FORSCOM, TRADOC, USAREC, and ARPERCEN are subordinate. The Army knows that a reservist on a SADT tour like the petitioner is entitled to the sanctuary protections of 10 U.S.C. 1163(d) if on the tour he accumulates in excess of 18 years of service. That is why the most senior Army headquarters reserves the decision to offer such a tour to a reservist who will go over 18 years. In this case, ARPERCEN's poor records caused DCSPER to lose his chance to decide.

will be made only with the approval of the Secretary of the Army."

19. 10 U.S.C. 1552(a) provides in pertinent part:

> "The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of the military department, may correct an error or remove an injustice....Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

20. AR 15-185, paragraph 19 e.(1) provides in pertinent part:

> "The Army Board of Correction of Military Records is authorized to take final action on behalf of the Secretary of the Army, under 10 U.S.C. 1552, in approving the correction of military records, provided such action (1) has been recommended by the Army Staff; (b) is agreed to by the Board; and (c) falls into one of the following categories:...

(i) Award of reserve participation credit in computation of years of satisfactory service where such service was improperly or erroneously credited."

STATEMENT

1. The petitioner, James L. Bawcum, holds a commission in the grade of Lieutenant Colonel in the United States Army Reserve. He is currently on active duty at the Presidio of San Francisco under the authority of special active duty for training (SADT) orders which would have terminated on May 21, 1984, but for an intervening temporary restraining order issued by the district court and extended by stipulation of the parties through the hearing on the cross-motions for summary judgment in district court. The petitioner remains on active duty at the Presidio incident to stay orders issued by the court of appeals.

2. The petitioner received his commission in 1958 and served for a

period of almost 15 years, including two tours of duty in Vietnam, until he was released from active duty due to a reduction in force (RIF) in 1974. He was understandably bitter and for four years did not even open correspondence from the Army. Finally, in 1978, he did open correspondence from the Army which invited him to seek additional active duty credit. He then made the decision to participate in the reserve program. For the remainder of 1978 through 1980, the petitioner used the active duty for training program to increase his military skills. He went on his required annual training, attended military exercises and schools, and on his own time acquired additional military logistical skills. Suddenly in 1981, things changed. The Army had no one available on active duty

with his newly acquired logistics skills.7/ From 1981 to the present, the Army has asked the petitioner to take a series of special active duty for training tours because no one on active duty was available to do the work. He has worked on this project at Headquarters Department of the Army, Headquarters Forces Command (FORSCOM), First Army, and now Sixth Army. He started at the senior headquarters and moved down to the armies.

3. In January 1982, the petitioner and all other Reservists received a

---

7/ The petitioner had been trained in the bar code inventory accounting system commonly used in grocery stores. The Army was in the process of adopting this optical inventory system for controlling its equipment such as spare parts.

letter8/ from the U.S. Army Reserve Components Personnel and Administration Center (RCPAC now ARPERCEN) introducing a "Retirement Points Accounting System." The letter said ARPERCEN fully realized that its historical data on reservists might be incomplete or incorrect but requested that reservists not attempt to correct their records until they received a second annual statement under the system. The petitioner never received a second annual statement.

4. On January 3, 1984, the petitioner began a SADT tour at the Presidio of San Francisco which was to

---

8/ The letter is found in the appendix at E1. It provided in part at E4: "DO NOT ATTEMPT to correct the historical section until you receive the second annual statement under this system."

terminate on May 21, 1984. On April 27, 1984, the petitioner sent a letter to the commander of ARPERCEN wherein he claimed that as of May 21, 1984, he would be entitled to service credit in excess of 18 years and gave notice that under the sanctuary provisions of 10 U.S.C. 1163(d) he wished to remain on active duty until eligible for retirement. On May 8, 1984, the petitioner sent a letter conveying the same message to the Secretary of the Army. After filing this action in district court, the petitioner received an answer from

the ARPERCEN commander responding to both inquiries.9/

On May 17, 1984, the petitioner filed the original action in district court seeking to enjoin his release from active duty. This district court ruled that the petitioner had been prevented from exhausting his administrative remedies and determined that it would decide the 18 year issue. The petitioner subsequently stipulated to the ABCMR deciding the service issue on the condition that the Army make a "thorough

---

9/ The answer is found in the appendix at F1-F7. The shibboleth language is instructive, e.g., "complete, thorough analysis" and "comprehensive review." The petitioner submitted the same supporting documents to the ARPERCEN commander and the ABCMR [which sent them to him]. The first time, ARPERCEN credits 17 years, 7 months and 27 days: the next time 17 years, 11 months, and 1 day. The variance is not mainly a result of examining pay records.

and good faith effort" to determine his active federal service entitlement as of May 21, 1984. [Stipulation, appendix G1-G3.] The decision of the ABCMR was that as of May 21, 1984, the petitioner was entitled to service credit for 17 years and 329 days, i.e., 36 days less than 18 years.

6. On January 30, 1985, the petitioner filed a motion for review of the ABCMR decision and for summary judgment.10/ The respondent filed a

---

10/ Prior to filing petitioner's brief, the petitioner and respondent stipulated to an additional 25 days of credit which had been overlooked by the ABCMR, leaving petitioner 11 days short of 18 years service.

cross-motion for summary judgment.11/ The district court found that the ABCMR decision was supported by substantial evidence, not arbitrary and capricious, and not contrary to law; and granted summary judgment to the respondent. [Judgment/Order, App. B1-B5.]

7. On April 26, 1985, the petitioner noticed his appeal. On September 9, 1985, the court of appeals heard oral argument and the matter was submitted. During oral argument, respondent's

---

11/ The respondent used a declaration of a LTC Jelen in support of its motion. The petitioner challenged LTC Jelen's expertise, but the district court did not rule on this issue prior to ordering the case submitted. The court of appeal cited LTC Jelen's declaration as de novo review rather than as an adverse expert witness. Relevant portions of LTC Jelen's declaration are set out in the appendix at H1-H11.

attorney indicated petitioner might only be as little as 2 days short of 18 years but the Army was not sure. The court of appeals affirmed.

8. The basis for federal jurisdiction in the district court is found in 28 U.S.C. 1331.

ARGUMENT

The petitioner seeks allowance of his petition for a writ of certiorari for the following, independent reasons:

a. the court of appeals has so far departed from the accepted and usual judicial proceedings,

b. the court of appeals has so far sanctioned the departure from accepted and usual judicial proceedings by the district court, and

c. the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

To help clarify issues involving the counting of days, the petitioner provides the following summary comparison of the days of service awarded by the

ABCMR to the petitioner and those given by LTC Jelen.

LINE#[12]	ABCMR[13]	JELEN[14]	NET DIFFERENCE[15]
1.	12	13	+1
2.	13	14	+1
3.	27	27	0
4.	33	31	-2
5.	19	12	-7
6.	38	38	0
7.	19	19	0
8./9.	407	418	+11
10.	13	13	0
11.	123	122	-1
12.	224	229	+8 & -3
13.	140	152	+12
			+33 & -13

12/ LINE # refers to periods of service found on the 20 August 1984, DARC Form 2610, which is part of the ABCMR decision at App. C46, C47. The petitioner and respondent agreed to number the lines from top to bottom, discounting the 14 year period, for ease of reference.

13/ ABCMR days are found on the DARC Form 2610 which the Board adopted as to periods of service. See App., C1

14/ JELEN's days are found at App. H8, H9.

15/ Line 12 requires understanding Jelen's explanation found at App. H5-H7.

THE ABCMR DECISION

The ABCMR decision does not address the claims made by the petitioner, is wrong on its face, and does not represent a thorough and good faith effort to determine petitioner's active duty service.

The ABCMR did not fully consider the petitioner's application to correct his records. Under penalty of perjury, the petitioner told the ABCMR the following: periods of active duty, travel time claimed, and travel mode. [Question No. 13 to the application at App. C17 refers to the enclosure found at C24, C25 which makes these claims]. No one examined the claims for travel time. Mr. Golden said the petitioner's pay records were used to compute his travel time for the purpose of the DARC Form 2610. App. C43. Pay records only show

what travel time the Army has already allowed and paid for. They are silent as to what travel time should have been allowed based upon orders. The ABCMR decision incorporated Mr. Golden's statement and goes on to say that in OTJAJ's opinion, allowable travel time had been included in the periods of active duty. App. C6, C7. But that is not what OTJAG said. OTJAG in its Comme 4 to the petitioner's application, said, after examining the limited documents that the petitioner was able to provide [App. C26-C36 orders], that as to those documents, travel time was included in the period of active duty and cited authority. App. C51. The authority cited by OTJAG is absolutely contrary to the regulations which govern the prepar tion of orders as outlined supra in

Footnote 4. Travel time is added to either or both ends of the period of active duty. That is what the petitioner was claiming. OTJAG then goes on to assume that Mr. Golden included travel time in the DARC Form 2610 periods. App. C54. In summary, Mr. Golden examined pay records without evaluating petitioner's claims. OTJAG examined orders attached to the application and did not consider additional travel time because it misinterpreted the regulations and thought Mr. Golden had evaluated the travel time claims when he had in fact only examined pay records. No one evaluated the petitioner's claims under regulations which control travel time.

Any period of service 140 days or longer entitled the petitioner to travel by his personally owned vehicle (POV).

JTR, Appendix J, Subparagraph P. Lines 8/9, 12, and 13 meet this qualification. The petitioner was entitled to travel by POV from his home given on the orders to the duty station and back home. AR 135-200, paragraph 1-7 b.(1). On Line 13, the very tour the petitioner is currently on under orders authorizing POV travel, the ABCMR, Mr. Golden, OTJAG and ARPERCEN did not understand that the petitioner was owed travel time from his home in Waco, Texas, to Presidio of San Francisco and back. LTC Jelen picked up this point in his declaration at App. H7. On Line 12, the same oversight was made.[16]

16/ The mistake is not exactly the same. The ABCMR seems to have recognized that POV travel was authorized and that the petitioner had in fact been paid for 9 days travel from the duty station to his home on the orders. Why the ABCMR did not find that the petitioner was entitled to a like period going to his duty station is unknown.

Again, LTC Jelen catches the mistake at App. H5-H7. But he then makes a mistake. Travel time is based upon the home address given on the orders unless amended before the tour begins, or after the tour begins, with ARPERCEN approval. AR 135-200, paragraph 1-7 b.(1). There was no amendment of the home. See App. C30-33. On Line 8/9, even LTC Jelen cannot help. In his application, the petitioner provided an order at App. C34 which shows conclusively that there is no break in service between the two periods. Although he reviewed the application, LTC Jelen could not find this attached order. See App. H1. Mr. Golden might have discovered this fact but he was not examining petitioner's

claims but instead looking for pay records.17/ Line 8/9 has another error. During this continuous period of 416 days, the petitioner went from his home to Albuquerque, New Mexico, to Washington, D.C., back to Albuquerque,18 then to Atlanta, Georgia, and would have traveled back to Albuquerque but for the respondent asking him back on active duty after a short break in service. For all this travel in his POV the petitioner was given 2 days of travel

---

17/ It is a mystery why Mr. Golden did not discover that the petitioner had been paid for this 11 day period since respondent's counsel gave petitioner's counsel a copy of the pertinent pay record and LTC Jelen found it.

18/ The petitioner returned to Albuquerque to pick up his family, move his furniture, and to ship personal effects.

time. The tour in Washington, D.C. was less than 140 days, a temporary duty. But the tour in Georgia was continuous PCS duty which was tacked on to the temporary duty without a break. Therefore, the petitioner is entitled to the travel time authorized in Case 3, paragraph M4156, of the JTR. Even without case 3, the petitioner, at a minimum, is entitled to travel from his last duty in Atlanta and entitled to credit whether he does or not. DODPM ¶10241. In summary, the patent ABCMR mistakes are:

Line 13		12 days
Line 12		9 days
Line 8/9	no break	11 days
Line 8/9	travel	16 or 5 days19/

Therefore, the petitioner has more than the 36 days the ABCMR claims he lacks.20/

The ABCMR and ARPERCEN did not make a thorough and good faith effort to determine the petitioner's active service

---

19/ The POV travel rate is 300 miles/day plus one day for a remainder greater than 150 miles. Washington, D.C. back to Albuquerque is 1824 miles or 6 days. Albuquerque to Atlanta is 1381 miles or 5 days, 10 days round trip. JTR, M1050, 2. Even if by some leap of logic POV travel incident to a PCS move in the continental United States is not authorized, the petitioner must be paid for travel time by surface transportation. AR 135-200, paragraph 1-11c.

20/ The petitioner need only overcome the 29 day deficit ARPERCEN found. This issue, as well as OTJAG's opinion regarding division of a reservist days of active service by 360 to determi years of service, will be considered in the section reviewing the memorandum of the court of appeals.

The petitioner was placed in the position of creating a record for the ABCMR because ARPERCEN had not provided a record of service credit as it had promised and told the petitioner to do nothing about it. That is why the district court concluded the petitioner was prevented from exhausting his administrative remedies. When the petitioner attempted to protect his rights by giving notice of his desire to remain on active duty, ARPERCEN realized that under the provisions of 10 U.S.C. 1163(d) and Interim Change No. I07 to AR 635-100 the petitioner was entitled to remain on active duty if in fact he had 18 years of service. And this had happened without approval of his higher headquarters as required by AR 135-200, paragraph 5-4. On behalf of the Secretary

of the Army, ARPERCEN found that the petitioner had less than 18 years, claiming the exhaustive review in Footnote 9.21/ Shortly thereafter ARPERCEN was notified to compute the petitioner's service for the ABCMR. Even with additional documentation provided in the petitioner's application ARPERCEN took back some service credit it had previously given although it was compelled to give in net terms more credit in light of clear documentation.22/ ABCMR review was no more thorough or in good faith as is clear from page 4

21/ At this juncture, ARPERCEN gave credit for 17 years, 7 months, and 27 days. Later ARPERCEN gave credit for 17 years, 11 months, and 1 day.

22/ Compare App. C46, C47 and F6, F7. On the last period, one day is removed. On Line 8/9, a break in service now appears although the order at C34 shows no break.

[App. C9-C12] of its decision. First, it invokes a statute of limitations to preclude review of records before June 1981.23/ Next, it states the applicant claimed excess travel when no one had applied the travel time regulations to the periods of service. It also states the petitioner counted one period of service twice when the application showed 13 lines [App. C24, C25] of service as did the DARC Form 2610 [App. C46, C47]. Then the petitioner confronts more shibboleth language,

> "The applicant has not presented, and his records fail to disclose, any evidence which corroborates his self-authored statement of service..."

23/ Counsel for the parties called the ABCMR. The ABCMR knew that ARPERCEN's letter had precluded the petitioner from seeking correction earlier. The petitioner's ABCMR application also said this in answer to Question 12. App. C16.

What about the orders the applicant submitted at App. C26-C36? What about the Line8/9 pay record? What about applying travel pay regulations to periods of service and examining claims? The ABCMR also "notes" the petitioner is seeking more than 366 days of service in a year when this is a simple matter of whether one accounts for a period of service by its beginning or ending date. ARPERCEN showed the same periods. Finally, the ABCMR says the convoluted OTJAG method of computing service is proper in "this" case knowing full well that ARPERCEN uses the DARC Form 2610 to compute service for thousands of reservists. The ABCMR and ARPERCEN did not make a thorough or good faith review of the petitioner's application.

THE DISTRICT COURT DECISION

The district court found that the decision of the ABCMR is supported by substantial evidence, is not arbitrary and capricious, and is not otherwise contrary to law.

The petitioner contends that the district court's finding is clearly erroneous, arbitrary and capricious, and contrary to law. He further contends that the district court and the court of appeals applied the wrong standard of review to Lines 8/9, 12, and 13.

A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S. v. United States Gypsum Co., 333 U.S.364

(1948). The foregoing discussion of th ABCMR decision shows it is mistaken and did not address the petitioner's claims In addition, 36 days represents 1/2% of the days in 18 years. The parties stipulated to an additional 25 days incident to the cross-motions for summary judgment, reducing the day shortfall to 11 days or .1%.24/ At this point it seems fair to say that th district court should have been aware that the ABCMR decision was seriously defective. Then LTC Jelen's declaratio is offered by the respondent as an expert, adverse witness. LTC Jelen in large part confirms the stipulation and

---

24/ Stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them. Fenix v. Finch, 436 F.2d 831 (1971).

concludes the petitioner is entitled to credit for 17 years, 11 months and 19 days, i.e., 11 days short. But they are not the same 11 days. As pointed out by the chart supra, LTC Jelen took back 13 which cannot be done in light of 10 U.S.C. 1552(a)'s conclusive effect and because simple fairness should allow the petitioner to appeal the ABCMR decision rather than a changing decision.

The district court's finding that the ABCMR decision was not arbitrary and capricious is wrong. If an administrative record is so insufficient as to frustrate judicial review, it is arbitrary and capricious and will not be upheld. National Welfare Rights Organization v. Mathews, 533 F.2d 637 (1976). On page 14 of the district court transcript, the court below said:

> "How can it be determined fro the face of the memorandum exactly what particular calculations they had made, what particular data they wer relying on, and how they interpreted it? It is stated in all a very generalized fashion....And there is no wa to tell from the face of the memorandum of decision exactl what underlying documents it looked at, how they considere the particular calculations, what methodology they used to calculate. And, for example, some of the issues that were raised here, when they saw th documents with respect to tha particular, those particular orders, how they calculated the time."

The district court had before it an insufficient administrative record.

The district court's findings may not be upheld if based upon an erroneou view of the law. Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975). The petition contends that eligibility for, as well as amount of, retirement pay for a

reservist should be based on a 360 day year.25/

The district court did not apply the correct standard of review as to Lines 8/9, 12, and 13. The periods of service on Lines 12 and 13 are not disputed by the parties, and the period on Line 8/9 cannot be in light of the order at App. C34, the days stipulation of the parties in district court, and LTC Jelen's declaration. The district court was asked to apply legal standards (Army travel regulations) to these undisputed or undisputable facts, without making inferences. The standard of review as to these lines was therefore "mere error" because a question of law was involved.

25/ This issue will be discussed in the section reviewing the decision by the court of appeals.

Stauffer Laboratories, Inc. v. Federal Trade Commission, 343 F.2d 75 (9th Cir. 1965). If the district court had applied travel regulations just to these four lines, the petitioner had over 18 years of service.

THE COURT OF APPEALS' DECISION

The court of appeals found that the district court had used the appropriate standard of review, that LTC Jelen's declaration was de novo reviewed by the Army, and that the Army's division of the total number of days served by 365-1/4 was not arbitrary, capricious, or contrary to law.

The district court's findings may not be upheld if based upon an erroneous view of the law. Ritter v. Morton, 513 F.2d 942 (9th Cir. 1975). Conclusions of law are freely reviewable on appeal. Phoenix Title and Trust Co. v. Stewart, 337 F.2d 978 (9th Cir. 1964). An appellate court may enter judgment upon reversing a case if it finds that the facts are adequately developed in the record and it is able to direct judgment

in favor of one party as a matter of law. Perkins v. Matthews, 400 U.S. 379 (1971). The court of appeals made two findings in law; the standard of review and the 365-1/4 day year. From the district court discussion supra, it is clear that, as to Lines 8/9, 12, and 13, the court of appeals should have applied the "mere error" standard of review. The 365-1/4 finding will be discussed later.

LTC Jelen's review was not de novo. He was an adverse witness who purported was an expert on active duty computation The petitioner challenged his expertise, but the district court did not rule before it declared the case submitted. The court of appeals was not free to substitute its judgment for that of the

ABCMR. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). LTC Jelen's declaration is nothing more than admissions by the respondent that the ABCMR decision is wrong.

ARPERCEN and OTJAG gave the ABCMR different methods of computing years of service although both methods were based on a 365/366 day year. The ABCMR chose neither. It claims it adopted the OTJAG method with its extraordinary complexity found at App. C57, but avoids the complexity by simply dividing everything by 365-1/4.26/ In Borys v. U.S., the

---

26/ When ARPERCEN is forced by this decision to use the OTJAG method of computation of service for the thousands of such computations it makes annually, one wonders if it will be able to take the same shortcut? OTJAG would not approve. One cannot but conclude that the OTJAG mimeograph computation work-sheet is for desperate litigation situations only. See App. C60, C61.

Army used the ARPERCEN method to compute service. 201 Ct. Cl. 597, 603 (1973). ARPERCEN is the agency that makes active service computations. It created the DARC Form 2610, entitled COMPUTATION OF ACTIVE FEDERAL SERVICE, for that purpose If the petitioner is correct that the ABCMR decision is conclusive, then respondent's admission via LTC Jelen's declaration that an additional 33 days should be added to the ARPERCEN total more than overcomes the 29 day deficit.

The court of appeals and the district court should not have found that the ABCMR decision [that total days should be divided by 365-1/4 rather than 360] was not arbitrary, capricious or contrary to law. Statutory construction is a legal question freely reviewable by this Court. Phoenix, supra. The

petitioner followed the statutes where they lead. 10 U.S.C. 3911, 3926, 3991, 1405, 1333. A regular officer's eligibility for retirement pay under 10 U.S.C. 3911 equates exactly with the amount of retirement pay under 10 U.S.C. 3991. So would a reservist's under the petitioner's construction using a 360 day denominator. See Footnote 3. The statutes and regulations do not state how to convert days to years, but the petitioner's construction is reasonable given that 10 U.S.C. 1405 was an attempt by Congress to coordinate the regular and non-regular retirement systems where a reservist might qualify for either. The Army offers nothing to support its construction. ARPERCEN computes the

service one way; but OTJAG computes it another.27/ Congress might well have intended a 20 year reservist to get a slight break towards becoming eligible for retirement given the much greater uncertainty he faced compared to his regular counterpart of ever attaining 20 years of active federal service.

27/ This case is not analogous to Cass v. U.S., 417 U.S. 72 (1974), wherein this Court prevented five years of continuous active duty time from being pared down to 4-1/2 years by application of the round off provisions in footnote 4 of 10 U.S.C. 3991. This case is one step removed from that footnote to 10 U.S.C. 1405.

CONCLUSION

From the foregoing it is clear the court of appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the district court and has decided an important question of federal law affecting millions of reservists which has not been, but should be, settled by this Court, that the petition for a writ of certiorari should be granted.

Respectfully submitted.

_____

Attorney for the Petitioner

_____

Petitioner

Appendix A is a Memorandum, Court of Appeals, which was filed Nov. 4, 1985.

Text is as follows:

Not for publication

In the United States Court of Appeals
For the Ninth Circuit

James L. Bawcum, Plaintiff-Appellant,
v.
John O. Marsh, Jr., Secretary of the Army, Defendant-Appellee.

No. 85-1936

D.C. # CV 84-3136-MHP

MEMORANDUM*

Appeal from the United States District Court for the Northern District of California
Marilyn H. Patel, District Judge, Presiding
Argued and submitted September 9, 1985
San Francisco, California

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: WALLACE, HUG, and SCHROEDER, Circuit Judges.

The plaintiff-appellant brought this action in district court to prevent his release from active duty and to afford him the benefits of 10 U.S.C. § 1163(d). In order to qualify for the protections accorded by section 1163(d), the plaintiff is required to have served at least 18 years on active duty. The district court ordered the matter referred to the Army Board for Correction of Military Records (ABCMR), which fully considered appellant's application to correct his records to show that he had served the requisite 18 years. The Board determined that the appellant had not completed 18 years of active service and denied the appellant's application.

In addition to the ABCMR's review of the records, the Army commissioned a de novo review by Lt. Col. Jelen, which disagreed with the ABCMR's analysis in some respects, both favoring and disfavoring the appellant, but similarly concluded that the appellant fell short of the 18 years. The district court granted summary judgment for the defendant, holding that the decision of the ABCMR is supported by substantial evidence, is not arbitrary or capricious, and is not otherwise contrary to law. That is the appropriate standard of review. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971); Villa View Community Hospital, Inc. v. Heckler, 720 F.2d 1086, 1090 (9th Cir. 1983). The issue on appeal is therefore

whether the district court erred in granting summary judgment for the government.

We have carefully reviewed the appellant's contentions concerning specific errors, including alleged miscalculations of travel time computations. We agree with the district court that the appellant has not demonstrated that the Board was arbitrar capricious, or lacked substantial evidence for deciding that the appellant fell short of 18 years.

The Army's division of the total number of days served by 365-1/4 rather than by 360 as contended by the appellar was not arbitrary, capricious or contrary to law. The Board relied upon a memo from the Office of The Judge Advocate General which correctly

pointed out that a year is in fact slightly longer than 365 days, and that the reference in 10 U.S.C. § 1033 to division by 360 is for purposes of calculating reserve retirement pay. It is apparent from its language that it does not apply to computing years served for purposes of 10 U.S.C. § 1163(d).

Affirmed.

Appendix B is a Order Granting Summary Judgment in Favor of Defendant, U.S. District Court, Northern District of California, which was received Apr. 23, 1985, filed Apr. 26, 1985, and entered in Civil Docket May 2, 1985.

Text is as follows:

United States District Court
Northern District of California

James L. Bawcum, Plaintiff,
v.
John O. Marsh, Jr., Secretary of the Army, Defendant.

No. C-84-3136-MHP

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Upon consideration of the motions for summary judgment made by both parties, the supporting memoranda, exhibits and arguments thereon, and good cause appearing, the Court finds as follows:

Plaintiff brought this action seeking a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction against release from active duty, which had been previously schedule to occur on May 21, 1984. Pursuant to this Court's Order of May 17, 1984 restraining plaintiff's release pending resolution of this action, which Order has been extended to the present date by stipulation of the parties, plaintif has been retained on active duty status.

Pursuant to further stipulation of the parties, and this Court's Order of June 21, 1984, this matter was referred to the Army Board For Correction of Military Records (ABCMR), to determine a proper accounting of plaintiff's active duty credits. The ABCMR rendere

its decision in its memorandum opinion of October 17, 1984, which concluded that plaintiff had less than 18 years active duty for the purposes of 10 U.S.C. § 1163(d).

The Court has reviewed the ABCMR decision, and concluded that its decision is supported by substantial evidence, is not arbitrary and capricious, and is not otherwise contrary to law. Accordingly, it is hereby ORDERED that plaintiff's motion for summary judgment is DENIED and that summary judgment in favor of defendant is hereby GRANTED. The Court's Order of May 17, 1985, restraining the release of plaintiff from active duty, is hereby DISSOLVED.

DATED: Apr. 26, 1985

[SIGNED]: Marilyn Hall Patel
United States District Judge

Appendix B continues with a second pleading, which is a Judgment, U.S. District Court, Northern District of California, which was filed Apr. 30, 1985, and entered in Civil Docket May 1, 1985.

Text is as follows:

United States District Court
Northern District of California

James L. Bawcum, Plaintiff,
v.
John O. Marsh, Jr., Secretary of the Army, Defendant.

No. C-84-3136-MHP

JUDGMENT
Fed. R. Civ. P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed herein,

IT IS ORDERED AND ADJUDGED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that defendant's motion for summary judgment is GRANTED, and that the action is DISMISSED.

DATED: Apr. 30, 1985

[SIGNED]: Marilyn Hall Patel
United States District Judge

Appendix C is a ABCMR Memorandum of Consideration. It is on ABCMR letterhead, and bears a stamp with the number "-1803".

Text is as follows:

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: BAWCUM, JAMES L.
464-48-9855

BOARD DATE: 17 October 1984
DOCKET NUMBER: AC84-03901
INDEX NUMBER: 100.00

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Oliver Kennedy, Chairman

Mr. Samuel T. Brick, Jr., Member

Mr. Frank J. Sando, Member

Mr. John W. Matthews,
Executive Secretary

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairman on the above date. Army Regulation 15-185, the regulation governing the operation of the Board, provides that applications and the available military records pertinent to the corrective action requested will be reviewed to: determine whether to authorize a formal hearing; recommend that the records be corrected without a formal hearing; or, to deny the application without formal hearing if it is determined that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the

application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records

Exhibit B - Military Personnel Records

APPLICANT REQUESTS: That he be properly credited for all active duty (AD) performed by him. His application is dated 20 June 1984, and he states that he discovered the alleged errors in his records on 18 June 1984.

APPLICANT STATES: That the calculation of his total numbers of days of active duty (Ad) is incorrect; and that he served on AD for the times shown on Inclosure 1, which he feels is in excess of 18 years AD. (The total

number of days shown on Inclosure 1 is 6600, and of that total, 1130 days are for periods of duty after September 1973). Although not stated in his application, the applicant is apparently of the opinion that his years of AD should be computed by adding all of the days of AD actually performed by him (up to a maximum of 366 per year), and that the sum be divided by 360. In support of his application, the applicant also submitted copies of various orders to AD which have been issued to him, a Chronological Statement of Military Service, dated 22 August 1982, and a letter from an attorney, who requests that the Board determine the applicant's total number of days of AD, and that his total number of years of service be computed from that total. He also

requests that he be informed of the authority for the method of computation employed by the Board, and inquires whether the days of unused leave for which the applicant has been paid at various times are considered active service.

MATERIAL EVIDENCE OF RECORD: Incorporated in this memorandum and included by reference are the military and medical records which reflect, in pertinent part:

The applicant served on active duty from 19 September 1958 to 9 September 1973, when he was released from AD in the grade of major. Since that date, he has completed numerous short periods of active duty, as shown on the attached DARC Form 2610.

As of 21 May 1984, the applicant has completed 17 years and 329 days of AD. He is credited with 14 calendar years of service for 1 January 59 - 31 December 1972 period, and 1425 days of AD for service during the 19 September 1958 - 31 December 1958 and 1 January 1973 - 21 May 1984 periods; of that total, 1069 days are for periods of duty after September 1973. The 1425 days were converted to years and remaining days of AD as follows:

$$\frac{1425 \text{ days}}{365.25 \text{ days}} = 3 \text{ years, } 329 \text{ days (average number of days per year)}$$

On 20 August 1984, the Board was advised by the Reserve Personnel Center (ARPERCEN), in part, that the applicant's statement of active federal service has been recomputed using military pay

vouchers obtained from the Army Finance Center. The computation (17 years, 11 months, 1 day) allows active duty credit for all travel time shown on the pay vouchers. Based on the statement of service, he did not have 18 years of active duty on 21 May 1984, and is not eligible for the lock-in provisions of 10 U.S.C. 1163. (copy attached).

On 5 October 1984, the Board was advised by the Office of The Judge Advocate General (OTJAG), in part, that in the opinion of that office, the formula for calculating years of service stated in 10 U.S.C. 1336 (division by 360) does not apply in this case. An officer's years of service should be computed by first crediting calendar years of service, then adding all days of active service

during calendar years where the member was not in active service for the full year. The days are converted to years and remaining days of service by dividing by 365.25, the average length of a year. Under this method (assuming that the 20 August 1984 DARC Form 2610 is correct), the applicant had completed 17 years and 329 days of active service as of 21 May 1984.

In the opinion of OTJAG, allowable travel time permitted by regulations is properly included in the periods of active duty. It was also the opinion of that office that the fact that the applicant may have been paid for unused accrued leave does not add any days to the years of service. (copy attached).

Title 10, United States Code, Section 1552, provides the statutory

authority for correction of military records. Section 1552(b) provides that no correction may be made unless the claimant files a request on or before 26 October 1961, or within three years after he discovers the error or injustice, whichever is later. However, failure to file within three years after discovery may be excused if the Board finds it to be in the interest of justice.

DISCUSSION: In consideration of all the evidence, allegations and information presented by the applicant, in relation to the evidence from all the available records and statutory and/or regulatory provisions pertaining thereto, it is concluded that:

1. With regard to all periods of service ending prior to 20 June 1981,

the applicant has failed to make timely application for correction of his records, and he has failed to provide any reason why the Board should find it in the interest of justice to consider that portion of his application. Although he states that he discovered alleged errors in his records in 1984, the Board is of the opinion that he knew of the amount of active duty credited to him at the time he was paid for each period of service, and the 3 year filing periods commenced on the date of payment.

2. The Board is satisfied that the beginning and ending dates of the applicant's various short periods of active duty which are shown on the 20 August 1984 DARC Form 2610, are correct. The 61 days discrepancy

between the number of days of AD claimed by the applicant for periods of duty after September 1973 and the number shown in his records is attributable to his having credited himself with excessive travel days, and apparently counting one period of service twice.

3. The applicant has not presented, and his records fail to disclose, any evidence which corroborates his self-authored statement of service, which he feels shows the completion of over 18 years of active service. It is noted that, for several of the years listed, the applicant has claimed credit for substantially more than 366 days service.

4. For the reasons stated in the 5 October 1984 opinion of the OTJAG,

the formula for computing years of active service which is described in that opinion is considered to be the only proper formula for use in this case.

5. The applicant had not completed 18 years of active service as of 21 May 1984, and there is no basis for correcting his records to show that he had in fact completed that amount of service.

DETERMINATION: Applicant has failed to submit his application within the time required, to provide sufficient reasons for his failure to do so, or to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice.

BOARD VOTE:

[The initials of what appear to be three different individuals appear to the left of the phrase - DENY APPLICATION]

SIGNED, John W. Matthews
Executive Secretary

Appendix C continues with a photocopy of a Preprinted form which has been filled out by hand.

The form is numbered DD Form 149 in the lower left corner.

The title of the form is is:

> Application for Correction of Military or Naval Record Under the Provisions of Title 10, U.S. Code, Sec. 1552

Text that follows is presented in question and answer form, each numbered sequentially, the question equating to a number request for information and the answer equating to the hand-written answer. Any question which was answered with either Not Applicable (NA), or which was left unanswered, has not been included.

Application for Correction of Military or Naval Record Under the Provisions of Title 10, U.S. Code, Sec. 1552

No Number Q: Branch of Service

A: Army

No. 1: Q: Name

A: Bawcum, James L.

No. 2: Q: Present Rate, Grade

A: LTC, 05

No. 3: Q: Service Number

A: 05401696

No. 4: Q: Social Security Number

A: 464-48-9855

No. 6: Q: Present Status, if any, with respect to the Armed Services

A: IRR on SADT

No. 8: Q: Organization at Time of Alleged Error in Record

A: RCPAC

No. 9: Q: I desire to appear before the Board in Washington, D.C.

A: No.

No. 10: Q: Name and address of counsel

A: Paul M. Vuksich
540 15th Ave.
San Francisco, CA 94118

No. 11: Q: I request the following correction of error or injustice.

A: Properly credit me with all active duty performed to include continuous active duty from entry on active duty in 1958 to REFRAD in 1973, short tours of AD served from 1973 to present and all travel days incident to those tours.

No. 12: Q: I believe the record to be in error or unjust in the following particulars.

A: The calculation of my total AD days is incorrect and does not include numerous short tours I have served since my REFRAD in 1973. RCPAC has instructed me to make no attempt to correct the record until now.

No. 13: Q: In support of this application I submit as evidence the following.

A: I have served on AD for the times and in the duties shown at inclosure.

No. 14a: Q: The date of the discovery of the alleged error or injustice was

A: 18 Jun. 1984

No. 17: Q: Complete address

A: HQ, 6A, ODCSLOG Presidio of San Francisco, CA 94129

No. 18: Q: Date

A: 20 Jun 1984

No. 19: Q: Signature

A: (executed by) James L. Bawcum

Appendix C continues with a photocopy of a letter on the letterhead of Paul Michael Vuksich, Attorney at Law, 540 15th Ave., San Francisco, California 94118. The letter is dated June 21,

Text is as follows:

The Honorable President of the Board
Army Board for Correction of
Military Records
Department of the Army
Washington, D.C. 20310

Re: LTC James L. Bawcum, 464-48-9855

Dear Mr. President:

I represent LTC James L. Bawcum in a matter currently before Judge Marilyn Hall Patel, United States District Court for the Northern District of California. Judge Patel has stayed the proceedings pending a determination by the Board of whether or not LTC Bawcum has 18 years of active federal service.

Attached you will find a completed DD Form 149 with supplemental docu-

mentation. This represents all LTC Bawcum remembers about his active federal service. Judge Patel has ordered (by way of stipulation) that the Board make a good faith effort to examine records of other agencies such as RCPAC and Army Finance so that LTC Bawcum receives full credit for his service. In that regard, LTC Bawcum was paid during his service for 120 days of unused leave. Since he was paid for the days, are these days counted as days served?

Once you have arrived at LTC Bawcum's total days of service, I request that you indicate how you arrive at <u>years</u> of active federal service. I would also like to know

your statutory or other authority for making the computation as you do.

I thank the Board and you for your kind attention.

Sincerely,

(executed)

Paul M. Vuksich

PMV/st

enc: as

Appendix C continues with a photocopy of a handwritten form. The form is comprised of six vertical columns of information.

The table is hereinbelow presented so that the left half of the table is on this page, and the right half of the table is on the page immediately facing this page.

This method of presenting tables will be used through the rest of this Appendix C, as well as in later Appendice

Text is as follows:

This page has been intentionally left blank.

RYE	AD Description
59/05/22	Continuous Active Duty
60	Continuous Active Duty
61	Continuous Active Duty
62	Continuous Active Duty
63	Continuous Active Duty
64	Continuous Active Duty
65	Continuous Active Duty
66	Continuous Active Duty
67	Continuous Active Duty
68	Continuous Active Duty
69	Continuous Active Duty
70	Continuous Active Duty
71	Continuous Active Duty
72	Continuous Active Duty
73	Continuous Active Duty
74	Continuous Active Duty Upon REFRAD in Sep 73, I was paid for 60 days leave.
79	Phase II, C&GSC (Reno, NV) Exercise Grand Slam (Ft. Lewis, WA) Ariz State Univ. ROTC Detachment Ft. Lewis, WA (activated HAWK Br)
80	Camp Shelby, MS
81	Exercise Brave Shield (Ft. Lewis, WA) Exercise Brim Frost (Ft. Wainwright, AK)
82	HQ, First Army, ODCSLOG HQ, FORSCOM, ODCSLOG
83	Phase VI, C&GSC (Dover, Del) HQ, DA, ODCSLOG HQ, Sixth Army, ODCSLOG
84	HQ, Sixth Army, ODCSLOG

Upon REFRAD from AD tours since 1979, I have been paid for an accumulation of 60 additional days of leave.

AD Days	Tvl Days	Total Ad	Tvl Mod
246	N/A	N/A	N/A
366	N/A	N/A	N/A
365	N/A	N/A	N/A
365	N/A	N/A	N/A
365	N/A	N/A	N/A
366	N/A	N/A	N/A
365	N/A	N/A	N/A
365	N/A	N/A	N/A
365	N/A	N/A	N/A
366	N/A	N/A	N/A
365	N/A	N/A	N/A
365	N/A	N/A	N/A
365	N/A	N/A	N/A
366	N/A	N/A	N/A
365	N/A	N/A	N/A
110	N/A	N/A	N/A
12	1	13	Comc'l. Air
12	1	13	Comc'l. Air
25	4	29	POV
31	10	41	POV
38	1	39	Comc'l. Air
12	1	13	Comc'l. Air
18	3	21	Comc'l. Air
60	13	73	POV
356	9	365	POV
12	5	17	POV
120	4	124	POV
215	15	230	
140	12	152	POV

Appendix C continues with a photocopy of document on letterhead of the Department of the Army.

Text is as follows:

Department of the Army
Office of the Adjutant General
U.S. Army Reserve Components Personnel
and Administration Center
St. Louis, MO 63132

AGUZ-OP-0161-J
ORDERS T-02-304248A02
13 SEP 83

James L. Bawcum
5436 Lighthouse Lane
Burke, VA 22015

OP-0161

464 48 9855 LTC AD 14C5L
USAR CON GP RE

The following order is amended as

indicated.

So Much of:

T-02-304248

RCPAC

22 FEB 83

As Amended by:

T-02-304248A01

Is Further Amended

Pertaining to:

James L. Bawcum

464 48 9855 LTC 14C5L

5436 Lighthouse Lane

Burke, VA 22015

As Reads:

Reporting Date: Between 0730 &

0800 HRS 25 Aug 83 Period: 205

days

Acct: Clas: 2132070 11-7300 P3281.400G4

(GXGH) (1199-$5249)

(1250-$300) (1210-)

(2572-) (2199-$725)

(2119-) (2200) S23185

Acct: Clas: 2142070 11-7400 P3281.400G6

(GXGH) (1199-$23209)

(1250-$1327) (1210-)

(2572-) (2199-$725)

(2119-) (2200) S23185

How Changed: IFATR: Reporting Date: Between 0730 & 0800 Hrs 28 Feb 83 Period: 215 days

Acct: Clas: 2132070 11-7300 P3281.400G4 (GXGH) (1199-$29860) (1250-$1708) (1210-) (2572-) (2199-$725) (2119-) (2200) S23185

For Army Use: Auth: SADT-10 USC 672(D)683(A)(1)

VOCDR 25 FEB 83

PIPL: 6A-023

FORMAT: 700

TAG, RCPAC

OFFICIAL

DISTRIBUTION: 1A

DAAR-COB

HQ 6th USA PRESIDIO OF SF CA 94149

(unsigned)

RONALD W. ZELTMAN

BRIGADIER GENERAL, USA

COMMANDING

Appendix C continues with a second photocopy of document on letterhead of the Department of the Army.

Text is as follows:

[illegible]
[illegible]
U.S. Army Reserve Components Personnel
and Administration Center
St. Louis, MO 63132

AGUZ-OP-0161-J
ORDERS T-02-304248A01
27 AUG 83

James L. Bawcum
5436 Lighthouse Lane
Burke, VA 22015

OP-0161

464 48 9855 LTC AD 14C5L
USAR CON GP RE

The following order is amended as

indicated.

So Much of:

T-02-304248

RCPAC

22 FEB 83

Pertaining to:

James L. Bawcum

464 48 9855 LTC 14C5L

5436 Lighthouse Lane

Burke, VA 22015

As Reads:

Reporting Date: Between 0730 & 0800 HRS 25 Aug 83 Period: 178 days

Acct: Clas: 2132070 11-7300 P3281.400G4 (GXGH) (1199-$24700) (1250-$1413) (1210-) (2572-) (2199-$814) (2119-) (2200) S23185

How Changed: IFATR: Reporting Date: Between 0730 & 0800 Hrs 24 Aug 83 Period: 205 days

Acct: Clas: 2132070 11-7300 P3281.400G4 (GXGH) (1199-$5249)

(1250-$300) (1210-)

(2572-) (2199-$725)

(2119-) (2200) S23185

Acct: Clas: 2142070 11-7400 P3281.400G6

(GXGH) (1199-$23209)

(1250-$1327) (1210-)

(2572-) (2199-) (2119-)

(2200) S23185

For Army Use: Auth: SADT-10 USC

672(D)683(A)(1)

VOCDR 25 FEB 83

PIPL: 6A-023

FORMAT: 700

TAG, RCPAC

OFFICIAL

DISTRIBUTION: 1A

DAAR-COB

HQ 6th USA PRESIDIO OF SF CA 94149

(unsigned)

RONALD W. ZELTMAN

BRIGADIER GENERAL, USA

COMMANDING

Appendix C continues with a third photocopy of document on letterhead of the Department of the Army. This original photocopy is two, rather than one page long as the preceding two photocopy documents have been. The top 1/3 of the first page of this document is covered with largely undeceiferable writings; the balance of the document is substantially in the form of the immediately two preceding photocopy original documents.

Text is as follows:

[illegible]

Department of the Army
Office of the Adjutant General
U.S. Army Reserve Components Personnel
and Administration Center
St. Louis, MO 63132

AGUZ-OP-0161-D
ORDERS T-07-024712A01
06 FEB 82

James L. Bawcum
11529 Hannnett Ave
Albuquerque, NM 87112

464 48 9855 LTC 14C5L AD
USAR CON GP MD

The following order is amended as

indicated.

So Much of:

T-07-024712

RCPAC

29 JUL 81

Pertaining to:

James L. Bawcum

464 48 9855 LTC 14C5L

11529 Hannett Ave

Albuquerque, NM 87112

As Reads:

Period: 178 days

Acct: Clas: 2112070 11-7100 P3281.000G4

(GXAJ) (1199-$8942)

(1250-$505) (1210-)

(2572-) (2199-$400)

(2119-) (2200) S23185

Acct: Clas: 2122070 11-7200 P3281.000G4

(GXAJ) (1199-$1494?)

(1250-$845) (1210-)

(2572-) (2199-) (2119-)

(2200) S23185

How Changed: IATR: Period: 356 days

Acct: Clas: 2122070 11-7100 P3281.000G1 (GXAJ) (1199-$7900) (1250-$505) (1210-) (2572-) (2199-$487) (2119-) (2200) S23185

[illegible]

Unsigned by C.F. Briggs, Brigadier General, USA, Commanding

Appendix C continues with a photocopy of a Department of the Army form, numbered AGUZ Form 249, which is dated 22 Aug 82, whose subject is Chronological Statement of Retirement Points.

The left portion of the form is presented on the following page, and the right portion of the form is presented on the page next following.

Text in pertinent parts is as follows:

AGUZ-RAS-A
BAWCUM JAMES L
4846 Candlewood Lane
Stone Mountain GA 30088

Furnished in Lieu of DA Form 1383

Reason for Issuance: Annual Statement

Social Security Number: 464489855

Date of Birth: 360624

Current Grade: LTC

Beginning Date			Ending Date			Inactive Duty
Yr	Mo	Day	Yr	Mo	Day	Points
58	05	23	59	05	22	
59	05	23	60	05	22	
60	05	23	61	05	22	
61	05	23	62	05	22	
62	05	23	63	05	22	
63	05	23	64	05	22	
64	05	23	65	05	22	
65	05	23	66	05	22	
66	05	23	67	05	22	
67	05	23	68	05	22	
68	05	23	69	05	22	
69	05	23	70	05	22	
70	05	23	71	05	22	
71	05	23	72	05	22	
72	05	23	73	05	22	
73	05	23	74	05	22	
74	05	23	75	05	22	
75	05	23	76	05	22	
76	05	23	77	05	22	20
77	05	23	78	05	22	14
79	05	23	80	05	22	
80	05	23	81	05	22	
81	05	23	82	05	22	

Member-ship Points	Active Duty Points	Qualifying for Retirement Yr Mo Day	Total Points Credit-able
15	246	01 00 00	0261
	366	01 00 00	0366
	365	01 00 00	0365
	365	01 00 00	0365
	365	01 00 00	0365
	366	01 00 00	0366
	365	01 00 00	0365
	365	01 00 00	0365
	365	01 00 00	0365
	366	01 00 00	0366
	365	01 00 00	0365
	365	01 00 00	0365
	365	01 00 00	0365
	366	01 00 00	0366
	365	01 00 00	0365
15	110	01 00 00	0125
15		00 00 00	0015
15		00 00 00	0015
15		00 00 00	0035
15		00 00 00	0029
15	12	00 00 00	0027
15	38	01 00 00	0053
15		00 00 00	0015
	Total	17 00 00	5689

Total Service (Qualifying and non-Qualifying) for Longevity Pay Purposes	24 02 29

Appendix C continues with a photocopy of a Disposition Form, which is numbered DA Form 2496. The form is dated 31 Jul 84. The form is filled out both in typing and in handwritting. No differentiation is made herein.

Text in pertinent parts is as follows:

REFERENCE OR OFFICE SYMBOL:

DARC-PSA-A
Bawcum, James L.
464 48 9855

SUBJECT:

Application for Correction of Military Records

TO: Director, PPC
Attn:

FROM: Director, PSD

DATE: 31 Jul 84
Mrs. Smith/37426

Comment 1

In response to the attached application, request that you furnish comment, recommendation, opinion and/or

record facts, as appropriate, for the guidance of the Board.

Executed by: Stephen C. Engelking, LTC, GS Director, Personnel Services

2 Incl.

1. Live Case

2. Records

(The bottom portion of the Form is not completed.

Appendix C continues with a photocopy of a Memo, Dated 20 Aug 84.

Text is as follows:

DARC-PPC Bawcum, James L.
464-48-9855 (31 Jul 84)
SUBJECT: Application for Correction of Military Records

To: Personnel Services Dir.
Attn: Corrections Br.
Special Actions Div., PSD

FROM: Chief, Policy Division

DATE: 20 Aug 1984
Mrs. Lee/cs/7371

Comment 2

The following represents our findings as it relates to the application:

1. Creditable service for the purpose of determining eligibility or whether a member meets the requirements for retirement varies with each retirement type. AR 135-180 governs

computation of service under the provisions of Title 10 USC, section 1331. AR 635-100 governs computation of service for retirement under the provisions of Title 10 USC, sections 3911 and 1405. Computation is based upon the formula prescribed by the specific law under which the member is retired.

2. The statement of active federal service for LTC Bawcum has been recomputed using the military pay vouchers obtained from the US Army Finance Center. This computation allows active duty credit for all travel time shown on the pay vouchers.

3. In computing active federal time when action duty for training is more than 30 days, the provisions of DOD Manual 1340.12-M (Military Retired

Pay Manual) paragraph 10116, and DOD Military Pay and Allowances Entitlements Manual, paragraph 10108, apply to change the ending date to 30 if it is the last day of the month and other than 30.

4. Based on the attached statement of active federal service, LTC Bawcum did not have 18 years of active duty on 21 May 1984 and is not eligible for the lock-in provisions of Title 10 USC, section 1163.

Signed By: Paul E. Golden
Chief, Policy and Procedures Office

1 Incl

Appendix C continues with a photocopy of DARC Form 2610, dated 20 Aug 84, which was the enclosure to Comment 2. The photocopy is of a table, with 12 vertical columns. The top portion notes that the table is a "Computation of Active Federal Service", is dated 20 Aug 84, is for James L. Bawcum, and gives his social security number, then is blank halfway down the page to a section titled "Active Federal Service".

If there was nothing in the column, it is not included.

Text is as follows:

---

*Line #	Enlisted Warrant Commissioned	From Year	Month	Day
0	AGUZ Fm 249			
1	DA Fm 2139	78	07	10
2	DA Fm 2139	78	08	13
3	DA Fm 2139	78	09	04
4	DA Fm 67-7	78	10	08
5	DA Fm 67-7	79	08	06
6	DA Fm 2139	80	05	23
7	DA Fm 2139	81	01	23
8	DA Fm 2139	81	05	27
9	DA Fm 2139	82	02	01
10	DA Fm 2139	82	07	25
11	214/DA 2139	82	10	01
12	214/DA 2139-1	83	02	28
13	Orders	84	01	03

* Numbering as agreed to by petitioner and respondent for clarity in the summary judge motion in district court and before the court of appeals.

To			Total		
Year	Month	Day	Years	Months	Days
			14	11	26
78	07	21			12
78	08	25			13
78	09	30			27
78	11	09		1	02
79	08	24			19
80	06	29		1	07
81	02	10			19
82	01	20		7	24
82	07	18		5	18
82	08	06			13
83	01	31		4	00
83	10	09		7	12
84	05	21		4	19
Total Active Service - This Page			17	11	01
Total Active Federal Service			17	11	01

Appendix C continues with a photocopy of a memo, dated 5 Oct 1984.

Text is as follows:

DAJA-AL 1984/2833 (31 July 1984)
SUBJECT: Application for Correction of Military Records

TO: OSA, ABCMR

FROM: DAJA-ALP

DATE: 5 Oct 1984
MAJ Holland/jc/44586

Comment 4

1. It is the opinion of this office that the formula stated in 10 U.S.C. 1333 (division by 360) does not apply to the determination of how many "years of service" the applicant has achieved for purposes of 10 U.S.C. 3911. The latter statute requires that years of service be computed under 10 U.S.C. 3926. 10 U.S.C. 3926 specifies

that years of service are computed by adding all active service as an Army member (and certain other periods not pertinent to this applicant). In the applicant's Further Memorandum for Preliminary Injunction, dated 18 June 1984 (included in the file you furnished), the applicant relies on 10 U.S.C. 3991 to argue that 10 U.S.C. 1333's 360-day formula applies. However, 10 U.S.C. 3991 clearly governs only the amount of retired pay for a person who is otherwise entitled to such pay. In other words, 10 U.S.C. 3991 does not answer the question of whether a person has sufficient service to retire, but applies by its own terms if and only if retirement eligibility has already been established under other pertinent laws (see also 10 U.S.C. 3929). Likewise,

10 U.S.C. 1333 applies by its own terms only for the purpose of computing retired pay under chapter 67 of title 10, U.S. Code; 10 U.S.C. 3911 and 3926 are part of a different chapter (chap. 367) of title 10. Further, it is significant that in 10 U.S.C. 1405, which refers to 10 U.S.C. 1333 (the provision with the division by 360 rule), there is a separate enumeration of "years of active service" (compare 10 U.S.C. 1405(1) and (3)). It is logical to conclude that Congress envisioned that "years of active service" (see 10 U.S.C. 1405(1)) would be calculated by a method distinct from, and not duplicative of, the calculation of years of service in 10 U.S.C. 1405(3).

2. The applicant's counsel (in his letter of 21 June 1984, at Incl. 1), questions whether days of "unused leave" for which the applicant was paid are to be counted as "days served". In our opinion, the fact that the applicant may have been paid for unused accrued leave does not add any days to the years of service calculated under 10 U.S.C. 3926 (see 37 U.S.C. 501(c)).

3. In our opinion, the allowable travel time permitted by the regulations in effect when the active duty was performed is properly included in the period of active duty. See, for example, paragraphs 1-13 and 1-15, AR 135-200, 1 January 1983, and paragraph 4-2, AR 135-210, 1 July 1982.

4. Further, it is our opinion that an officer's years of service

under 10 U.S.C. 3926(a)(1), i.e., the calculation which is pertinent to 10 U.S.C. 3911 in the applicant's case, should be computed by the method described in our previous opinion DAJA-AL 1980/1186, 22 February 1980, to Cdr, MILPERCEN (copy attached as Incl 3). That method first credits complete calendar years. It then counts all days of active service during calendar years where the member was not in active service for the full year and converts those days to equivalent years and remaining days, depending on whether the period was during a leap year or regular year. The sum of the remaining days is then divided by the average length of a year (365.25 days) to determine equivalent years. We note that our 1980 opinion was consistent

with an earlier opinion, JAGA 1956/6469, 4 September 1956, construing 10 U.S.C. 3926. The general principle underlying the 1980 opinion (that the fictional 30 day/month or 360 day/year rule should be used only where authorized by statute) is also consistent with our prior opinions on matters other than 10 U.S.C. 3911 retirement eligibility (JAGA 1960/5250, 18 January 1960, and JAGA 1957/4185, 10 June 1957).

5. In our opinion, paragraph 10116, DOD Retired Pay Manual, and paragraph 10108, DOD Pay and Allowance Entitlements Manual, cited in paragraph 3 of Comment 2 from RCPAC, do not govern the determination of years of service for retirement eligibility under 10 U.S.C. 3911, and should not be used for that purpose. By their terms, those

directives provide the manner of computing total creditable service for basic pay, not for retirement eligibility.

6. This office assumes that the beginning and ending dates for the short periods of active Federal service between 1978 and 1984 shown on the DARC Form 2610 prepared 20 August 1984 by RCPAC (unnumbered Incl to Comment 2) are correct and that they properly include allowable travel time (see paragraph 2, Comment 2). When the short periods shown on the DARC Form 2610 and the extended period of active duty (from 19 September 1959 to 9 September 1973) shown on the DD Form 214 included in the applicant's OMPF are converted to "years of service" by the computation method discussed in paragraph 4, above, it is our opinion that the applicant

had completed 17 years and 329 days (i.e., less than 18 years) of service as of 21 May 1984, for purposes of 10 U.S.C. 3911.

FOR THE JUDGE ADVOCATE GENERAL:

(signed)
Robert F. Holland
Major, JAGC
Military Personnel Law Branch
Administrative Law Division

3 Incl
added 1 incl
3. Copy, DAJA-AL 1980/1186

Appendix C continues with a photocopy of a memo, dated 22 Feb 1980.

Text is as follows:

DAJA-AL 1980/1186 (26 December 1979)
SUBJECT: Service Computation

TO: DAPC-MSS-R
Hoffman II

FROM: DAJA-ALP
Pentagon

DATE: 22 Feb 1980
CPT England/76000

1. In response to your request for guidance as to service computations for retirement purposes, it is the opinion of this office that the computation of active Federal service under 10 U.S.C. 3926, for the purpose of determining retirement eligibility under 10 U.S.C. 3911, should be based on the actual number of years and days of active Federal service performed,

not on a formula utilizing the fictitious thirty-day month and 360-day year.

2. The actual years of service of a member may be computed as follows:

a. Count the number of years in which member was on active duty for the entire calendar year.

b. Count the number of actual days served during non-leap years in which member was not on active duty for the entire year. If this total exceed 365, divide it by 365 to determine the nearest whole number quotient with remainder expressed.

c. Count the number of actual days served during leap years in which member was not on active duty for the entire year. If this total exceed 366, divide it by 366 to

determine the nearest whole number quotient with remainder expressed.

d. Add the remainders from the steps b and c above and divide the sum by 365.25. If the quotient is at least one, member may be given credit for an additional year. An actual-day computation worksheet is attached as Incl 11. [Censored] service computation, as of 20 February 1980, is attached as Incl 12.

3. This opinion is limited to the determination of eligibility for retirement and does not purport to change the use of fictional 30-day month/360-day year where its use is expressly authorized by statute, e.g., for the purposes of calculating pay.

FOR THE JUDGE ADVOCATE GENERAL

(Signed By): Jack F. Lane, Jr.

Lieutenant Colonel, JAGC

Chief, Personal Law Branch

Administrative Law Division

12 Incl

Added 3 Incl

10. DACA-FP Memo (28 Jan 80)

11. Computation Worksheet

12. Computation Worksheet -

MAJ [Censored]

Appendix C continues with a photocopy of a mimeographed Computation Worksheet. The worksheet is designed so that there are lines to the right of each question/ statement where one would presumably write down results of computations. The blanks are omitted below, with only the writings included.

Text is as follows:

---

1. Number of complete years of service.

2. Number of actual days during incomplete non-leap years of service;

Divide by 365 (nearest whole no.)

Remaining days

3.* Number of actual days during incomplete leap years of service;

Divide by 366 (nearest whole no.)

Remaining days

4.* Remaining days from 2 plus remaining days from 3;

Divide by 365.25 (nearest whole no.)

5. Total complete years of service.

* If none of the incomplete years of service fall in a leap year, delete steps 3 and 4.

Appendix D is an Order, Court of Appeals, which was filed Dec. 6, 1985.

Text is as follows:

In the United States Court of Appeals
For the Ninth Circuit

James L. Bawcum, Plaintiff-Appellant,
v.
John O. Marsh, Jr., Secretary of the Army, Defendant-Appellee.

No. 85-1936

D.C. # CV 84-3136-MHP
(Northern District of California)

ORDER

Before: WALLACE, HUG, and SCHROEDER, Circuit Judges.

The panel, as constituted above, has voted unanimously to deny the petition for rehearing.

Appendix E is a photocopy of a letter, undated, on letterhead of the Department of the Army, Office of the Adjutant General, U.S. Army reserve Components Personnel and Administration Center, St. Louis, MO 63132.

Text is as follows:

Reply to Attention of: AGUZ-RAS-SC

SUBJECT: Retirement Points Accounting System

Dear Reservist:

In April 1981, the Commanding General, RCPAC, chartered a study group to look in depth at the Retirement Points Accounting System and subsystems in the Center and to recommend short and long range solutions to the problems affecting the system. The study group was composed of experts from every element of the Center connected with retirement points accounting. The

group's mission was to provide a more timely and accurate accounting of RCPAC's customers' (IRR and TPU members) retirement points.

Several procedural changes are now in force to improve posting of active duty for training and extension course completion points. Both areas have contributed to inaccurate annual points statements (AGUZ Form 115).

The study group also identified issuance of statement of service annually as an area that would produce immediate benefits to you, and reduce the problems involved in issuing the 20-year letter and certification for pay at age 60. While we fully recognize that your historical data may be incomplete or incorrect initially, we solicite your support in reviewing your

new annual statement (AGUZ Form 249--Chronological Statement of Retirement Points) in two ways as follows:

PART ONE - Current Year Data. Please review current year points data as you have in the past years with the use of AGUZ Form 115, challenging any incorrect or incomplete area(s) by providing this Center, ATTN: AGUZ-RAS-A, with documentary evidence to support your claim(s). An automated corrections feature of the new Retirement Points Accounting System is now on line and should greatly reduce the time required in responding to your request for correction.

PART TWO - Historical Data. Please review your historical section for completeness. If you find period(s) of prior service missing or inaccurate,

you should, using the PMO Guide on the reverse side of this letter, collect the necessary documents to support correction of the missing period(s) and retain this information in your personal file. DO NOT ATTEMPT to correct the historical section until you receive the second annual statement under this system. Allow us time to exercise the new system and to reduce the backlog in this area.

Your patience and continued support are essential in making the new Retirement Points Accounting System responsive to your needs.

(Signed by): Donald R. Woolf
LTC, GS
Coordinator, Retirement
Points Accounting
System

1 Incl (Reverse)

AGUZ FL

1 Jan 82

2363-R

Appendix F is a photocopy of a letter, dated May 17, 1984, on letterhead of the Department of the Army, Office of the Adjutant General, U.S. Army reserve Components Personnel and Administration Center, St. Louis, MO 63132.

Text is as follows:

Reply to Attention of: DARC

Mr. Paul Michael Vuksich
Attorney at Law
540 Fifteenth Avenue
San Francisco, CA 94118
Dear Mr. Vuksich:

Thank you for your letter of April 27, 1984, and your letter to Secretary of the Army Marsh, dated May 8, 1984, concerning Lieutenant Colonel James L. Bawcum, 464-48-9855. This letter responds to both inquiries.

A complete, thorough analysis of all available records, including the documentation provided by you, concerning the active federal service of Colonel

Bawcum, has been completed. As a result of this comprehensive review, he has been credited with 17 years, 7 months, and 27 days of active federal service.

I am enclosing a form used at this Center which indicates the document used to compute active federal service. If Colonel Bawcum has documentation to substantiate additional service, that information should be provided for evaluation. Colonel Bawcum is serving on a Special Active Duty for Training Tour. These tours are of specific duration and the orders furnished individuals entering on such tours are self terminating orders containing a specific beginning date and a specified number of days. Their purpose is to provide reserve component expertise, as

needed, to Department of the Army for specific projects. Such tours are not intended to provide repetative active duty for retirement purposes. The acceptance of the current 140-day Special Active Duty for Training Tour constituted an agreement between Colonel Bawcum and the Department of the Army that such tour was of short duration, with a specific termination date, and would not be further extended except by approval of the Department of the Army. The current Special Active Duty for Training Tour being served by Colonel Bawcum is for 140 days, as specified in orders T-12-337589 issued by this Center on December 23, 1983. Since this tour has not been extended by the Department of the Army, Colonel

Bawcum must be relieved from active duty on May 21, 1984.

Sincerely,

(Signed By): RONALD W. ZELTMAN
Brigadier General, USA
Commanding

Appendix F continues with a photocopy of DARC Form 2610, dated 16 May 84. The photocopy is of a table, with 12 vertical columns. The top portion notes that the table is a "Computation of Active Federal Service", is dated 16 May 84, is for James L. Bawcum, and gives his social security number, then is blank halfway down the page to a section titled "Active Federal Service".

If there was nothing in the column, it is not included.

Text is as follows:

Enlisted Warrant Commissioned	From Year	Month	Day
AGUZ Fm 249			
DA Fm 67-7	78	Aug	14
DA Fm 67-7	78	Sep	5
DA Fm 67-7	78	Oct	10
DA Fm 67-7	79	Aug	12
DA Fm 67-7	80	May	24
DA Fm 67-8	81	Jan	24
DA Fm 67-8	81	May	27
DA Fm 67-8	81	Jul	27
DD Fm 214	82	Oct	1
DD Fm 214	83	Feb	28
Orders	84	Jan	3

To			Total		
Year	Month	Day	Years	Months	Days
			14	11	26
78	Aug	25			12
78	Sep	29			25
78	Nov	9			31
79	Aug	24			12
80	Jun	28			36
81	Feb	10			18
81	Jul	25		1	29
82	Jun	14		10	24
83	Jan	28		3	28
83	Sep	2		6	6
84	May	21		4	20
Total Active Service - This Page			17	7	27

Appendix G is a Stipulation, District Court, Received Jun 19, 1984, Filed Jun 21, 1984.

Text is as follows:

United States District Court
Northern District of California

James L. Bawcum, Plaintiff,
v.
John O. Marsh, Jr., Secretary of the Army, Defendant.

No. C-84-3136-MHP

STIPULATION

It is hereby stipulated between the parties to this action, through their undersigned attorneys, that the hearing on the Preliminary Injunction is stayed pending a decision by the Army Board for the Correction of Military Records (ABCMR) regarding plaintiff's active federal service.

This stipulation is contingent upon the defendant's continuing plaintiff in his present status up to and including July 13, 1984 and the plaintiff to continue his tour of duty under the terms of the initial Order of the Court.

IT IS FURTHER STIPULATED that the defendant (ABCMR) shall endeavor to issue its decision on or before July 13, 1984 and if it does not, then, defendant agrees to continue plaintiff's active duty until such time as a decision is rendered by ABCMR.

Defendant agrees to make a thorough and good faith effort to determine plaintiff's active duty service.

Dated: 6/18/84

(Signed by): Gary A. Hall
Assistant U.S. Attorney
Civil Division

Paul Michael Vuksich
Attorney for Plaintiff

(Approved by): U.S. District Judge

Handwritten note added below Mr. Vuksich's signature. Text is as follows:

> If no further hearing date or other date is set by the parties before August 27, 1984, that date is set down for a further status conference at which time the parties will appear at the hour of 9:30 a.m.

Appendix H is a Declaration of Lieutenant Colonel Richard Charles Jelen in support of the Respondent's Memorandum for Summary Judgment in the district court, filed March 26, 1985.

Text, from pertinent portion, is as follows:

United States District Court
Northern District of California

James L. Bawcum, Plaintiff,
v.
John O. Marsh, Jr., Secretary of the Army, Defendant.

No. C-84-3136MHP

DECLARATION OF LIEUTENANT COLONEL RICHARD CHARLES JELEN (Beginning on page 11 of the original. Paragraph numbers correspond with line numbers found on DARC FORM 2610, dated 20 August 84, App. C 46/47.)

(Line) 8-9 Lieutenant Colonel Bawcum claims he is entitled to an extra 11 days based on being extended on active duty during January 20, 1982 to February 1, 1982. We have no record (i.e. military orders) to show such an extension was properly

authorized and Bawcum has failed to submit any. Lieutenant Colonel Bawcum points, however, to block 11, Remarks, on his DA Form 2139 (Tab 5) for that period, which states, "SM due pay for period 21-30 January 1982. Due to extension of tour of duty." In my opinion if Lieutenant Colonel Bawcum was properly paid for this period, he is entitled to an extra 11 days. Lieutenant Colonel Bawcum also claims an extra 11 days for Permanent Change of Station (PCS) travel. He has produced a copy of orders showing he was assigned to Fort Meade, Maryland, for 60 days, Plaintiff's Exhibit 14. If he had been extended for two 179 day tours, with no break in service, as he claims, he would not have been entitled to additional travel time to bring his privately owned

vehicle to Fort Meade. Moreover, since Bawcum apparently remained at Stone Mountain, Georgia, after completing his tour at Fort McPherson, Georgia in July 1982 (See Tab 11, which shows his October 1982 orders giving his home address as Stone Mountain, Georgia, which is located near Fort McPherson) he would not be entitled to travel time for return to Albuquerque, New Mexico, since he never used that travel time. This is reconfirmed by Bawcum's failure to be paid for that travel. Thus, in my opinion Lieutenant Colonel Bawcum is not entitled to the extra 11 days he claims for Permanent Change of Station (PCS) travel.

(Line) 10. Lieutenant Colonel Bawcum does not dispute the computation of 13 days.

(Line) 11. The computation (Tab 1) shows 4 months service for active duty from October 1, 1982, to January 31, 1983. Lieutenant Colonel Bawcum claims an additional 6 days for travel from Stone Mountain, Georgia, to Washington, D.C., and return. His military orders, Tab 12, show his address and home of record as Stone Mountain, Georgia, and do not authorize use of a private automobile to get to Washington, D.C. Thus he was entitled to allowance for travel only from Stone Mountain, Georgia, one travel day each way, which could have fallen on duty days. Altogether, Bawcum is entitled to the 120 days he served (per his orders, Tab 12, and his last Military Pay Voucher, DA Form 2139, for this period, Tab 20, which shows he was discharged on January 28,

1983). He also was entitled to at most, one additional travel day each way, which would give Bawcum between 120 days to 122 days depending on actual travel time used and schedules of commercial airlines. Any payment made to Bawcum beyond that period would be unauthorized under his orders since he was not authorized travel by privately owned vehicle.

(Line) 12. The computation (Tab 1) shows 7 months 12 days of active duty for the period February 28, 1983, to October 9, 1983. (Using the ABCMR methodology this is 224 days.) Bawcum claims an extra 9 days for travel from Burke, Virginia, to the Presidio. However, his home of record when he received the military orders for this duty was Stone Mountain,Georgia, TAb 17, and he was

only authorized travel from there, not from Burke, Virginia. Lieutenant Colonel Bawcum's orders do authorize travel by private automobile, Tab 17, and under the DOD Military Pay and Allowances Entitlements Manual, Tab 19, he was authorized one travel day for each 300 miles allowable travel or fraction thereof over 150 miles. See Table 1-2-4, Tab 19. The officially allowable distance from Atlanta, Georgia (located close to Stone Mountain) to the Presidio, San Francisco, contained in Army Regulation 55-60, Tab 20, is 2476 miles, which would give Bawcum 8 travel days to the Presidio. Upon leaving the Presidio in October 1983, Bawcum was credited with 9 days travel time to Burke, Virginia. See Plaintiff's Exhibit 17, page 91 (Block 11 of DA

Form 2139, Military Pay Voucher). However, on March 7, 1983, he stated his home of record to be Waco, Texas. Tab 13. Thus his allowable travel properly should have been to Waco, Texas, and not to Burke, Virginia. This would give an allowable travel time of 6 days, based on the official distance of 1777 miles, Tab 20, and Table 1-2-4, Tab 19, for a total of 229 days.

(Line) 13. Lieutenant Colonel Bawcum claims he is entitled to travel time home at the end of his current special active duty tour. His home of record is Waco, Texas, Tab 13, and his orders, Tab 16, authorize travel by private auto. Allowable travel time to and from the Presidio to Waco would [be] 6 days, based on the official distance of

1777 miles, Tab 20, and Table 1-2-4, Tab 19, for a total of 152 days under the ABCMR methodology.

H. Based on the foregoing analysis in paragraphs F and G, Lieutenant Colonel Bawcum's total active federal service would be 14 years 11 months 26 days plus:

1. 13 days
2. 14 days
3. 27 days
4. 31 days
5. 12 days
6. 38 days
7. 19 days

8-9. 418 days1/

10. 13 days

11. 122 days2/

12. 229 days

13. 152 days

This makes a total of 14 years 11 months 1114 days.

I. The proper way to convert the total figure arrived at in paragraph H to years is to use the methodology described in the ABCMR opinion at Tab 15, which accounts for normal years

---

1/ This figure includes 11 days for which I am assuming Lieutenant Colonel Bawcum was properly extended on active duty. No orders in his records indicate this, and Lieutenant Colonel Bawcum produced no records to the Department of the Army or the ABCMR to substantiate this point. If my assumption is incorrect, Lieutenant Colonel Bawcum would be entitled to 11 days less credit.

2/ This figure includes 2 travel days that are not presently verifiable.

having 365 days and leap years having 366 days. Under this methodology, one first takes the 1114 days and breaks them down into days during leap years and days during nonleap years. Days during leap years (1980 and 1984, Tab 1, red numbers 6 and 13) are 190; days during non leap years (the remaining ones) are 924. The non leap year days are divided by 365 to yield 2 years with a remaining 194 days. The 190 leap year days are less than 366, so they are not divided but rather added to the 194 nonleap year days to yield 384 days. These 384 days are divided by 365.25 to yield 1 year 19 days. This gives Lieutenant Colonel Bawcum a total of 17 yers 11 months and 19 days creditable service. [One reaches the exact...

Executed under penalty of perjury

on 19 March 1985 at Arlington, Virginia.

(Signed by): Richard Charles Jelen